STATE OF MICHIGAN

COURT OF APPEALS

DARLENE RUBIO, as Personal Representative of the Estate of SCOTT MICHAEL RUBIO, Plaintiff-Appellee, v LOUIS DANIEL MOTOWSKI, Defendant-Appellant.	UNPUBLISHED June 24, 2010 No. 289526 Macomb Circuit Court LC No. 2007-002169-NI

Before: SAAD, P.J., and HOEKSTRA and SERVITTO, JJ.

PER CURIAM.

In this wrongful death action, defendant appeals a judgment in favor of plaintiff, the personal representative of the estate of Scott Michael Rubio. For the reasons set forth below, we reverse.

Defendant argues that the trial court erred when it denied his motion for summary disposition. Specifically, defendant claims that plaintiff's wrongful death action is barred because Scott was engaged in wrongful conduct when he was killed and liability is precluded under the wrongful conduct rule. Defendant also contends that plaintiff's claim is barred by MCL 600.2955b.

Defendant moved for summary disposition under both MCR 2.116(C)(8) and (C)(10) but, because the trial court relied on evidence outside the pleadings, we review the decision pursuant to MCR 2.116(C)(10). *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 458; 750 NW2d 615 (2008). As this Court explained in *Hastings Mut Ins Co v Safety King, Inc*, 286 Mich App 287, 291; 778 NW2d 275 (2009):

> This Court reviews de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 30-31; 651 NW2d 188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id.*

"The wrongful-conduct rule provides that when a 'plaintiff's action is based, in whole or in part, on his own illegal conduct,' his claim is generally barred." *Hashem v Les Stanford Oldsmobile, Inc*, 266 Mich App 61, 89; 697 NW2d 558 (2005), quoting *Orzel by Orzel v Scott Drug Co*, 449 Mich 550, 558; 537 NW2d 208, 213 (1995). "The rationale that Michigan courts have used to support the wrongful-conduct rule are rooted in the public policy that courts should not lend their aid to a plaintiff who founded his cause of action on his own illegal conduct." *Orzel*, 449 Mich at 559. As the Court in *Hashem* further explained:

> [T]o implicate the wrongful-conduct rule, the conduct must be serious in nature and prohibited under a penal or criminal statute. Further, the wrongful-conduct rule only applies if there exists a sufficient causal nexus between the plaintiff's illegal conduct and the asserted damages. [*Hashem*, 266 Mich App at 89 (citation omitted).]

"In cases in which both the plaintiff and the defendant equally participated in the illegal activity, Michigan courts have refrained from affording relief to one wrongdoer against another and instead espouse the view that it is better to 'leave the parties where [the court] finds them.'" *Orzel*, 449 Mich at 560, n 11, quoting *Pantely v Garris, Garris & Garris, PC*, 180 Mich App 768, 774; 447 NW2d 864 (1989). However, as the Court is *Orzel* also observed at 569:

> An exception to the wrongful-conduct rule may apply where both the plaintiff and defendant have engaged in illegal conduct, but the parties do not stand in pari delicto. In other words, even though a plaintiff has engaged in serious illegal conduct and the illegal conduct has proximately caused the plaintiff's injuries, a plaintiff may still seek recovery against the defendant if the defendant's culpability is greater than the plaintiff's culpability for the injuries, such as where the plaintiff has acted " 'under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age....' " *Pantely*, 180 Mich App at 775, quoting 1 Story, Equity Jurisprudence (14th ed), § 423, pp 399-400.

Defendant argues that, when Scott was killed, he was engaged in wrongful conduct because he participated in the malicious destruction of property or in a conspiracy or attempt to maliciously destroy property. Any person who willfully and maliciously destroys or injures the personal property of another is guilty of a felony if the resulting damage is more than $1,000 and is guilty of a misdemeanor if the damage is $1,000 or less. MCL 750.377a. A conspiracy is a partnership in criminal purpose. *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993). Conspiracy is a specific intent crime, and requires both the intent to combine with others and the intent to accomplish the illegal objective. *Id*. An attempt offense consists of (1) an attempt to commit an offense prohibited by law and (2) any act towards the commission of the intended offense. MCL 750.92; *People v Thousand*, 465 Mich 149, 164; 631 NW2d 694 (2001).

Here, we hold that Scott engaged in a conspiracy to maliciously destroy property when he sustained the injuries that caused his death. Undisputed evidence showed that defendant, Scott, and his brother, Salvatore Rubio, concocted a plan to throw rocks at the victim's house. They gathered the rocks and put them in the back of defendant's truck. Salvatore and Scott climbed into the back of defendant's truck and defendant drove them past the woman's house. Salvatore testified that he handed Scott a rock to throw at the house and they agreed to throw the rocks on

the count of three. As they passed the house, Salvatore threw a rock and the rock hit a car in the driveway. Salvatore testified that he did not watch Scott throw his rock, but he recalled that he told police officers that Scott also threw a rock at the house. Salvatore testified that the plan was for defendant to drive the truck around the corner after he and Scott threw the rocks and that he and Scott would jump down from the truck bed, get inside the cab of the truck, and drive quickly away. After he got into the cab, Salvatore realized that Scott did not follow him. After defendant circled around, he and Salvatore realized that Scott had fallen out of the truck bed and sustained his fatal injuries. This evidence shows that Scott, Salvatore, and defendant intended to enter into a partnership and intended to commit a criminal act, which is sufficient to establish conspiracy.

Plaintiff argues that Scott did not engage in wrongful conduct because any intent was negated by his severe intoxication. Our Legislature has abolished the defense of voluntary intoxication except when a defendant does not know that a legally obtained medication or substance will cause intoxication or impairment. MCL 768.37; *People v Maynor*, 470 Mich 289, 296-297; 683 NW2d 565 (2004). Here, Scott was clearly aware that drinking alcohol would cause intoxication and, therefore, plaintiff cannot now claim that Scott did not have the requisite intent as a result of his drunkenness.

Plaintiff further claims that defendant was more culpable than Scott and, as a result, the wrongful conduct rule does not bar plaintiff's recovery. We hold that Scott and defendant were equally culpable in the conspiracy. Scott was going to throw a rock at the victim's property and defendant was driving the vehicle. Both Scott and defendant were intoxicated and, when he died, Scott's blood alcohol level was .221. No evidence was presented that defendant forced Scott to engage in this conspiracy. Because plaintiff presented no evidence that Scott acted "under circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age," the wrongful conduct rule applies. *Orzel*, 449 Mich at 569.

We also reject plaintiff's contention that there was no nexus between Scott's wrongful conduct and his injuries. See *Hashem*, 266 Mich App at 89. Plaintiff asserts that the proximate cause of Scott's death was not the conspiracy, but defendant's reckless and unsafe driving, as evidenced by skid marks on the road found near Scott's body.

In *Manning v Noa*, 345 Mich 130, 139; 76 NW2d 75 (1956), our Michigan Supreme Court held that the plaintiff's claim against a property owner for negligently repaired premises was not barred because the plaintiff was on the premises to illegally play bingo. At the time that the plaintiff was injured, she had finished playing bingo and was on her way home. *Id.* at 134-135. The Supreme Court found that the illegal bingo playing was collateral to and not the proximate cause of the plaintiff's injury. *Id.* at 135. The Court distinguished the plaintiff's claim from cases in which a plaintiff and defendant are acting in concert for a criminal purpose or an injury results from turmoil surrounding a criminal event. *Id.* at 134.

Here, unlike in *Manning*, Scott was injured in the midst of the criminal activity. Scott was not merely riding in the back of the pickup truck when he fell. Rather, he fell out of the truck adjacent to the house that was the subject of the wrongful conduct and he fell at or around the time he and Salvatore agreed, on the count of three, to throw rocks at the house. This constitutes a sufficient nexus between the wrongful conduct and Scott's injury.

For the reasons set forth above, viewing the evidence in a light most favorable to plaintiff, the trial court erred when it denied defendant's motion for summary disposition. Because we reverse the trial court's decision on this basis, we need not reach the question of whether plaintiff's claim was also barred under MCL 600.2955b.

Reversed.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto